

## **SECTION 2. COUNCIL MEETINGS AND THE BROWN ACT**

The Ralph M. Brown Act<sup>7</sup> is commonly referred to as the "Brown Act" and is also known as the "Open Meeting Law." It applies to all local governmental agencies. The Brown Act is the primary guide for conducting City business. It attempts to strike a balance between public access to meetings and decisions of public bodies on the one hand and the need for confidential candor, debate, and deliberation on the other.

The Brown Act applies to the legislative bodies of local agencies in California. It applies not only to the Council as the legislative body for the City of Fresno, but it also applies to standing committees of the Council even if they comprise less than a quorum, to subsidiary boards, commissions, and committees created by Charter, ordinance or resolution, and to certain private corporations. Under our Mayor-Council form of government, the Mayor is no longer a member of the Council. As such, the Mayor is not directly subject to the Brown Act. However, if the Mayor were to participate in unlawful meetings of certain Councilmembers, the Mayor could be held in violation of the Brown Act.

Since the basic mission of the Brown Act is to ensure that decisions are made in public, there are very specific rules on how meetings must be noticed, on agenda requirements, on how meetings must be conducted, and on public access at Council meetings. The City Clerk and City Attorney work with the Council to ensure that Brown Act requirements are met. The City Clerk is responsible at the agenda and notice stage and the City Attorney is responsible for guiding the Council at meetings.

### **A. WHAT IS A "MEETING" AND "ACTION TAKEN?"**

The term "meeting" is very broadly defined in the Brown Act as any congregation of a majority of the members of the Council at the same time and place to hear, discuss or deliberate upon any matter which comes under the subject matter jurisdiction of the Council. The Brown Act contains various rules designed to prevent the circumvention of its open meeting requirements. For example, serial meetings are prohibited and a quorum of newly elected Councilmembers and present Councilmembers is prohibited. For example, a Councilmember's e-mail to other Councilmembers may be considered a serial meeting. Such incidents are fact intense, and will require a case by case analysis. The pivotal issue is apparently whether the Councilmember was seeking to gain a collective concurrence. The California Attorney General is currently reviewing this issue and will be issuing a formal opinion. We will keep the officials informed of any new developments in this area.

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<sup>7</sup> Gov. Code §§ 54950 *et seq.*

The broad definition of "meeting," together with the Brown Act's definition of "action taken," serves to ensure that the purposes of the Act are met. "Action taken" is defined in Government Code Section 54952.6 as follows:

Action taken means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.

This definition is very broad and includes matters taken up at meetings and away from meetings. Notwithstanding this, the following are not meetings:

- A telephone conversation which does not serve to "poll" members of the Council would not be held to be a meeting for purposes of the Brown Act.
- Individual contacts or conversations between a Councilmember and any other person.
- Attendance of a majority of the members of the Council at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the Council, provided a majority of the members do not discuss among themselves specific business within the Council's subject matter jurisdiction.
- Attendance of a majority of the members of the Council at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, provided a majority of the members do not discuss among themselves specific business within the Council's subject matter jurisdiction.
- Attendance of a majority of the members of the Council at an open and noticed meeting of another body of the local agency provided a majority of the members do not discuss among themselves specific business within the Council's subject matter jurisdiction.
- Attendance of a majority of the members of the Council at a purely social or ceremonial occasion, provided a majority of the members do not discuss among themselves specific business within the Council's subject matter jurisdiction.

- Government Code Section 54953.1 provides that the Brown Act shall not be construed to prohibit members of a legislative body from giving testimony in private before a grand jury, either as individuals or as a body.

## **B. TYPES OF MEETINGS**

There are three types of meetings that can be called under the Brown Act. Those are regular meetings, special meetings and emergency meetings.

### **1. Regular Meetings.**

Regular meetings are those that are held at a regular time and place established by local rules. Regular meetings of Council are held on Tuesdays. At regular meetings, the only items that can be acted upon are those that are listed on an agenda that is posted at least 72 hours in advance, with certain exceptions. For an item to be acted upon, it must be listed on the agenda as an "action item." An action item would be an item for which there is a recommendation to the Council on how to act. Items that are not action items are those that are commonly known as status reports or workshops. For those items, there can be no action taken at the meeting except to refer the matter to the Council at another meeting or to staff.

At a regular meeting, items can be added to the agenda under certain circumstances. An item may be added to the agenda by a majority vote of the entire body if an emergency arises relating to the health and safety of the public, such as a crippling natural disaster. The definition of "emergency" is so narrow that agenda items are hardly ever added under the invocation of this exception.

Another exception to the notice requirements at a regular meeting would include items where there is a need to take "immediate action" and when the need came to the attention of the City after the posting of the agenda. Agendas for regular meetings must be posted 72 hours prior to the meeting. If an item requiring action arises after that posting, the item may be placed on the agenda by a 2/3 vote of the entire Council (or if less than 2/3 of the body is present, a unanimous vote of those present). If staff or certain members of the Council were aware of the item prior to the posting of the agenda, this exception may not be used. The key requirement, the need to take immediate action on the item, must be shown by specific factual findings.

### **2. Special Meetings.**

Special meetings are those called on an "as needed" basis for special purposes. The Council President or a majority of Councilmembers may call a special meeting. Special meetings require at least 24 hours written notice to

each member of the Council. Also, the media must be notified and the agenda must be posted 24 hours in advance. The most important thing to remember about special meetings is that only those items listed in the agenda may be discussed. No other action may be brought in front of the Council at a special meeting except those items noticed 24 hours ahead of time.<sup>8</sup>

### **3. Emergency Meetings.**

In case of an emergency situation, the Council may call an emergency meeting on less than 24 hours notice. The term "emergency situation" is narrowly defined as a work stoppage, a crippling disaster, or other activity which severely impairs the public health, safety or both as determined by a majority of the members of the Council.

## **C. NO ACTION OR DISCUSSION OF NON-AGENDA ITEMS RULE**

The basic rule under the Brown Act is that "no action or discussion shall be undertaken on any item not appearing on the posted agenda."<sup>9</sup> The Brown Act's agenda requirements thus cover not only "action" items but also "discussion" items.

As noted above under "Regular Meetings," the Brown Act does contain exceptions to this rule. In addition to the exceptions regarding emergency situations and the need for immediate action, there are a few other narrow exceptions to the "no discussion on non-agenda items rule." Those exceptions are:

1. Members of the Council or staff may briefly respond to statements made or questions posed by persons during public comment periods;
2. Members or staff may ask questions for clarification and provide a reference to staff or other resources for factual information;
3. Members or staff may make a brief announcement, ask a question or make a brief report on his or her own activities;
4. Members may, subject to the procedural rules of the legislative body, request staff to report back to the legislative body at a subsequent meeting concerning any matter; and
5. The Council may itself as a body, subject to its Rules of Protocol, take action to direct staff to place a matter of business on a future agenda.

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<sup>8</sup> Gov. Code § 54956.

<sup>9</sup> Gov. Code § 54954.2, emphasis added.

The exceptions are not meant to swallow the rule. Thus, the Council may not engage in any significant discussion of non-agenda items. This means that long presentations, or wide-ranging questions, answers, and comments among the Councilmembers, between Councilmembers and the public, or between Councilmembers and staff are impermissible. Comments under these exceptions must be brief.

Under these exceptions, Council can request information or a report; however, direction to staff to do things or take action is action which must be placed on the agenda first. When Council is considering whether to direct staff to add an item to a subsequent agenda, these exceptions do not allow Council to discuss the merits of the matter or to engage in a debate about the underlying issue.

To protect Council from problems in this area, the current Rules of Protocol allowing a Councilmember to request up to three items on a subsequent agenda should be followed. If a situation arises and a Councilmember wishes to consider and vote on whether to place a matter on a future agenda, then Council's consideration and vote must take place with virtually no discussion (i.e., date and time discussion permissible, but not discussion on the merits). Again, we see no need for this as Council's Rules of Protocol allow individual Councilmembers to place items on the agenda.

In summary, Council can neither take action nor discuss any items unless they are specifically posted on the agenda. Comments under the exceptions to the Brown Act must be minimal and must be brief.

#### **D. CLOSED SESSIONS**

The Brown Act expressly authorizes closed sessions under explicit circumstances that must be met. Closed session matters must be noticed on the agenda by category so that the public can determine why the Council is calling a closed session. In addition, the vote tallies of certain final actions taken in closed session must be announced in open session after the vote is taken. The following are the most commonly used reasons for holding closed sessions in the City of Fresno. The Brown Act also permits closed sessions for real estate negotiations, certain specified threats to public security, and the license application of a rehabilitated criminal.

##### **1. Litigation**

The most common exception to public meeting requirements under the Brown Act is for active litigation. This allows the Council to meet in closed session to hear advice from legal counsel regarding the handling of active civil or administrative litigation. The Council may also go into closed session to discuss potential litigation in very limited circumstances. Potential litigation may only be discussed when the following criterion is met:

A point has been reached where, in the opinion of the legislative body of the local agency on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the local agency.<sup>10</sup>

This exception requires that the majority of the Council believe that there is an actual threat of litigation. Also, its legal counsel must concur in this opinion. Normally, this exception only arises whenever an actual threat has been made by a party who has the where-with-all to carry out the threat.

The Council may also meet in closed session to decide whether to initiate litigation. In addition, the Council may hold a closed session to decide whether the facts and circumstances surrounding a particular issue merit a closed session discussion.

## **2. Threats to Public Property; Security Threats.**

Closed session may also be held to discuss threats to the security of public buildings, or a threat to the public's right of access to public services or public facilities. These types of closed sessions may be held with the Attorney General, District Attorney, or law enforcement officers to discuss such security threats.

## **3. Personnel.**

The Council may also call a closed session to discuss personnel matters. The item must be listed on the agenda, along with the name of the employee and the purpose of the closed session. Personnel closed sessions may only be called to discuss the "appointment, employment, evaluation of performance, discipline, or dismissal" of an employee directly under Council control. Such closed sessions cannot be used to discuss salaries of any other employee. At the end of any closed session regarding personnel actions, the Council must report back in public the results of that closed session at the current meeting or the next regularly scheduled meeting. An employee subject to such a closed session has the right to determine whether the session will be held in public or private. The employee must receive written notice of the session at least 24 hours in advance.

## **4. Conference with Labor Negotiator.**

One of the most common reasons to hold a closed session under the Brown Act is the labor relations exception. This exception allows the Council to

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<sup>10</sup> Gov. Code § 54956.9(b)(1).

discuss issues involving "salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees."<sup>11</sup> At such closed sessions, the purpose is for the Council to give direction to its authorized negotiators. Those authorized negotiators then meet and confer with employee bargaining groups or consult with those groups on the matters listed above. Once agreement is reached, any contract must be approved in public.

#### **E. BROWN ACT VIOLATIONS**

Individual citizens may demand that the Council correct actions taken in violation of the Brown Act. Any citizen may make a written demand that the Council either declare an action null and void or cure the Brown Act defect within 90 days of any alleged violation, unless the action was taken in an open session but in violation of the agenda requirements. In those instances, the written demand shall be made within 30 days. The Council must act on the matter within 30 days of receiving the written notice. If no action is taken by the Council, any citizen may file a suit to have the action of the Council declared null and void.

If any action is successfully brought against the City for a Brown Act violation, the City may be required to pay attorneys' fees and costs. In addition, Councilmembers may be individually liable for Brown Act violations under the criminal law. Certain Brown Act violations are misdemeanors and can be punished by up to one year in jail and/or fines. For these reasons, this Office takes particular care in making sure that the City's business is done in the proper manner to prevent any actual or perceived Brown Act violations.

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<sup>11</sup> Gov. Code § 54957.6.